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DISTRICT IV

December 12, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2016AP435-CR State of Wisconsin v. Jasmine A. Weiss (L.C. # 2014CF163)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Jasmine A. Weiss appeals from a judgment of conviction and postconviction order. The only issue on appeal is whether the circuit court properly exercised sentencing discretion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Weiss was charged with two counts of physical abuse of a child, intentionally causing great bodily harm, a Class C felony. The victim in each count was Weiss's nearly four-month-old daughter, P.R.C. The criminal complaint alleged that P.R.C. was brought to an emergency room with a skull fracture and subdural hematoma on the left side of her head. A second, older fracture and hematoma was discovered on the right side of P.R.C.'s head.

Weiss pled no-contest to two counts of physical abuse of a child, intentionally causing bodily harm, a Class H felony. The circuit court sentenced Weiss to five years of imprisonment on the first count, comprising of three years of initial confinement and two years of extended supervision, and four years of imprisonment on the second count, comprising of three years of initial confinement and one year of extended supervision, to be served consecutively. Weiss filed a postconviction motion challenging the court's sentence. The court denied the motion. Weiss appeals.

We begin with the well-settled legal principles that govern this appeal. Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.***, ¶¶17-18. That presumption is rooted in the sentencing court's greater familiarity with the facts of the case and with the defendant's demeanor. *See* ***id.***, ¶18. Public policy strongly disfavors appellate court interference with the circuit court's sentencing discretion. ***Id.***

The circuit court is "required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of

the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. The weight to be given to each sentencing factor remains within the wide discretion of the court. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

The "'sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Gallion***, 270 Wis. 2d 535, ¶23 (quoted source omitted). The circuit court must provide its sentencing rationale on the record, but a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. ***State v. Fisher***, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. ***Gallion*** requires an explanation but not mathematical precision. *See* ***State v. Ziegler***, 2006 WI App 49, ¶25, 289 Wis. 2d 594, 712 N.W.2d 76.

In her brief, Weiss sets forth a laundry list of objections to the sentence, all rooted in her dissatisfaction with the length of initial confinement. She argues that the circuit court:

1. Did not discuss all of the required sentencing factors;
2. Did not adequately explain why it viewed Weiss's character negatively;
3. Did not explain why maximum confinement was needed to and did advance the sentencing objectives;
4. Did not discuss whether, or how, it considered the protection of the public;
5. Did not explain why a lengthy period of confinement was needed to protect P.R.C. since a pre-existing no-contact order was already in place;
6. Improperly considered abuse suffered by Weiss as a child to be an aggravating factor, rather than a mitigating factor;

7. Did not explain why maximum confinement was needed to effectively punish Weiss or to act as a deterrent to others; and

8. Considered an improper factor, namely, "the court's view of what society would demand."

Upon review of the sentencing transcript, we conclude that the circuit court properly exercised sentencing discretion. The court stated that the "overriding consideration" in its sentence was the gravity of the offense. The court reviewed the abuse suffered by P.R.C. In addition to the two skull fractures, doctors observed a bite mark on P.R.C.'s forearm and a bruise on her tricep. The court described P.R.C. as "absolutely vulnerable and defenseless." The court noted that the "amount of abuse" suffered by P.R.C. was "at the very top" of what would be considered bodily harm. The court recognized that the plea bargain had "placed a cap" on Weiss's exposure.

The circuit court considered Weiss's character. The court stated that Weiss's actions showed a "callous disregard" for her daughter's well-being. The court recognized that Weiss showed "a penchant for violent and aggressive behavior by biting." The court also noted that Weiss did not take her daughter for medical care after "crack[ing her] in the head multiple times." The court described it as "confounding" that a person who had been abused, as Weiss had been, would abuse another. The court noted that someone who has been abused can choose to not abuse and the court stated, "it's more aggravating for somebody to have suffered the way Ms. Weiss has and then to say, well, I'm going to be willing to perpetuate this cycle by now offending against somebody else."

The circuit court considered the "general deterrence" aspect of its sentence, noting Weiss's sentence may impact choices made by other persons unable to care for children. The court also recognized the "retributive aspect" of its sentence, pointing to society's

"understandable" "call out for … punishment" in child abuse cases. In addition to the obvious harm to P.R.C., the court stated that the harm caused by Weiss "has rippled out" to others such as the child's grandparents whose "emotional turmoil" was evident in their comments to the court.

The circuit court considered the primary sentencing factors. The court's discussion of Weiss's character was substantial. The court's negative view of her character was directly tied to the abuse she inflicted on P.R.C. The court's treatment of Weiss's past abuse as an aggravating factor was not improper. "Whether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case." ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). Weiss has not shown that the court assessment of that factor was unreasonable or unjustifiable. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 435, 351 N.W.2d 758 (Ct. App. 1984) (the strong policy against appellate interference with sentencing discretion places the burden on defendant to "show some unreasonable or unjustifiable basis in the record.").

The gravity of the offense was identified as the primary sentencing objective. At several points, the circuit court pointed to the limited penalty facing Weiss and that the degree of abuse was "at the very top" of the range for the crime to which she had pled. That discussion adequately explains why the court believed maximum confinement was both appropriate and necessary. The existence of a no-contact order between Weiss and her children did not preclude the imposition of confinement, particularly when the foremost consideration for the court was the gravity of the offense. The "public" which is protected by a sentence includes P.R.C. and her grandparents. The court did not ignore that consideration.

Finally, we see nothing improper in the circuit court's discussion of what "society" would want in the sentence. When discussing the penalty limit created by the bargained-to crimes, the court stated that "there just … isn't any room … for compressing down the sentence that is called for … by the facts … because that's all part of the gravity of this entire offense." The court suggested that society may question the "purpose" served by a court "if when faced with the most extreme sort of abuse the sentence doesn't seem to reflect the gravamen of the offense." Those comments speak to the need to punish Weiss for her conduct. We will not disturb the weight ascribed to that factor by the circuit court. *See* ***Stenzel***, 276 Wis. 2d 224, ¶9.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals